No. 95-1124

Supreme Court, U.S.
FILED
JAN 31 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

BLUE CROSS AND BLUE SHIELD OF VIRGINIA,

Petitioner,

vs.

MARY BAILEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TIMOTHY G. CLANCY
CUMMING & HATCHETT
2236 Cunningham Drive
Hampton, VA 23666
(804) 827-9207

ROBERT E. HOSKINS
Counsel of Record
FOSTER & FOSTER, L.L.P.
601 East McBee Avenue
P.O. Box 2123
Greenville, SC 29602
(803) 242-6200

Attorneys for Respondent

8225
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

7 pp

QUESTIONS PRESENTED

1. Should this Court review the Fourth Circuit's application of and reliance upon *Brown v. Blue Cross Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir.), *cert. denied*, 498 U.S. 1040 (1991), wherein the court held that in some instances when a conflict of interest is present, the degree of deference to be accorded an ERISA plan administrator's decision to deny benefits may be less deferential than the pure arbitrary and capricious standard, when this Court has previously declined to review the identical issue by denying certiorari on the *Brown* case and when there is no split of authority among the various circuit courts?

2. Should this Court review the Fourth Circuit's application of the *contra proferentum* doctrine to ERISA cases when this Court has previously declined to review that issue in the seminal case of *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir.), *cert. denied*, 498 U.S. 1013 (1990), *reh'g denied*, 498 U.S. 1074 (1991), and when there is no split of authority among the various circuit courts?

STATEMENT OF THE CASE

Mary Bailey (Bailey) agrees generally with Blue Cross Blue Shield of Virginia's (Blue Cross) statement of the case. Blue Cross has somewhat of an adversarial slant to its recitation of the facts (for instance, the use of the word "controversial" in describing high dose chemotherapy supported by a peripheral stem cell rescue ("HDC-PSCR"); however, the facts as stated are generally accurate, and Bailey agrees with the same.

SUMMARY OF ARGUMENT

The two issues which Blue Cross has proposed that this court review derive from the cases of *Brown v. Blue Cross Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991), and *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir.), *cert. denied*, 498 U.S. 1013 (1990), *reh'g denied*, 498 U.S. 1074 (1991).

The issues raised by Blue Cross in its Petition are identical to the primary issues in each of the above cases, and this Court has previously declined the invitation to review the relevant issues. There is nothing unique or new about this case; therefore, Bailey believes that the case *sub judice* is not an appropriate one for review by this Court and that Blue Cross' Petition should be denied.

REASONS FOR DENYING THE WRIT

ISSUE I.

Blue Cross has petitioned this Court to review the lower court's holding that Blue Cross' decision was "entitled to some deference, but this deference would be lessened to the degree necessary to neutralize any untoward influence resulting from

the conflict" (Petition, A6 (citing *Doe v. Group Hospitalization & Medical Services*, 3 F.3d 80, 87 (4th Cir. 1993))). The lower court then went on to hold that Blue Cross was acting under a conflict of interest and that "the proper deference to give may be slight, even zero." (Petition, A6 (citing *Brown*, 898 F.2d at 1564)).

The exact language in the lower court's opinion to which Blue Cross takes exception is a direct quote from *Brown*. A petition for writ of certiorari was filed with this Court on the *Brown* case, and this Court declined the opportunity to review the Eleventh Circuit's holding. The issue regarding the amount of deference to be given to Blue Cross' decision in the case at bar is no different than the issue in *Brown*, and therefore, Petitioner has presented no reason why this Court should vary from its denial of the writ in the *Brown* case.

Blue Cross also argues that there is a split among the circuits regarding the amount of deference to be given a decision of an administrator operating under a conflict of interest. To the contrary, a careful review of the cases cited by Blue Cross on this issue reveals that there is no substantive difference among the holdings of the various circuit courts. In every circuit court opinion cited by Blue Cross in its Petition, the respective circuit court has held consistent with this Court's opinion in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), that a conflict of interest may be grounds for varying a strict arbitrary and capricious or abuse of discretion standard of review.

The only difference among the various circuit court opinions cited by Blue Cross is the articulation of this Court's holding in *Firestone* that a "conflict must be weighed as a factor in determining whether there is an abuse of discretion." *Firestone*, 489 U.S. at 115 (citing Restatement (Second) of Trusts § 187 cmt. D (1959)) (alteration in original).

Every circuit court opinion cited by Blue Cross has held that a conflict of interest is a factor in evaluating a fiduciary's decision under the abuse of discretion standard, but the circuit courts have simply memorialized the rule using varying semantics. After all, how else can a conflict of interest be factored into the review of a fiduciary's decision if the conflict does not to some degree lessen the deference accorded a decision?

Because this Court has previously declined the invitation to review Blue Cross' first issue and because there is no real divergence of authority among the circuit courts, Bailey would respectfully request that this Court deny Blue Cross' Petition.

ISSUE II.

Blue Cross also wishes this Court to review the various circuit courts' application of the *contra proferentum* doctrine to certain ERISA cases. This Court has previously had an opportunity to review the seminal case on the applicability of the *contra proferentum* issue. In *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir.), *cert. denied*, 498 U.S. 1013 (1990), *reh'g denied*, 498 U.S. 1074 (1991), the Ninth Circuit first held that the doctrine of *contra proferentum* applied in ERISA cases. Like *Brown*, this Court had an opportunity to review the holding in *Kunin* and declined to do so. There is nothing different from *Kunin* or unique about Bailey's case which would warrant consideration of this issue which this Court has previously declined to consider.

Blue Cross also asserts that the circuit courts are divided in their holdings regarding application of the doctrine of *contra proferentum*. However, a thorough review of the opinions of the circuit courts cited by Blue Cross demonstrates that in reality there is no split. Every circuit court opinion cited by Blue Cross

on this issue, except the Eighth Circuit opinion of *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150 (8th Cir. 1990), *cert. denied*, 501 U.S. 1239 (1991), held that the doctrine of *contra proferentum* was appropriate in ERISA cases. Blue Cross has made an specious legal argument, however, in that it has failed to cite to this Court the opinion of *Delk v. Durham Life Ins. Co.*, 959 F.2d 104 (8th Cir. 1992), wherein the court held that:

> When an ambiguity in the language of an ERISA plan cannot be resolved by interpreting the language as would "an average plan participant" . . . the district court correctly used the principle of *contra proferentum* and construed the ambiguous language against Durham. As a matter of federal common law, a court construing plans governed by ERISA should construe ambiguities against the drafter only if, after applying ordinary principles of construction, giving languages ordinary meaning and admitting extrinsic evidence, ambiguities remain.

Delk, 959 F.2d at 105-06 (citing *Degeare v. Alpha Portland Indus.*, 837 F.2d 812, 816 (8th Cir.), *vacated*, 489 U.S. 1049 (1988)).

Like every other circuit court whose opinion was cited by Blue Cross, the Eighth Circuit recognizes the doctrine of *contra proferentum* under the appropriate circumstances, and there appears to be no split of authority as Blue Cross would have this Court believe.

The circuit courts have almost unanimously recognized the doctrine of *contra proferentum* under the appropriate

circumstances in an ERISA case, and the development of this doctrine is simply evidence of the evolution of the federal common law of ERISA. There is nothing unique or special about the case *sub judice* which would merit this Court's review; therefore, Bailey would respectfully request that this Honorable Court decline the invitation to review these matters and deny Blue Cross' Petition.

CONCLUSION

The identical issues which Blue Cross has requested this Court review were previously raised in *Brown* and *Kunin*, and on these prior opportunities, this Court declined the invitation to review the issues raised by Blue Cross. There is no significant split among the circuit courts on either of the issues raised by Blue Cross; therefore, Bailey would respectfully assert that there is no good reason for this Court to review the lower court's decision, and Bailey would respectfully request that Blue Cross' Petition be denied.

Respectfully submitted,

ROBERT E. HOSKINS
FOSTER & FOSTER, L.L.P.
601 East McBee Avenue
Post Office Box 2123
Greenville, SC 29602
(803) 242-6200

TIMOTHY G. CLANCY
CUMMING & HATCHETT
2236 Cunningham Drive
Hampton, VA 23666
(804) 827-9207

Attorneys for Respondent